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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED PRESS, Plaintiff, - v.- UNITED STATES DEPARTMENT OF DEFENSE, Defendant.	**ECF CASE** SUPPLEMENTAL DECLARATION OF KAREN L. HECKER 05 Civ. 5468 (JSR)

Associated Press v. United States Department of Defense Doc. 22

KAREN L. HECKER hereby declares, pursuant to 28 U.S.C. § 1746, as follows:

1. I am an Associate Deputy General Counsel in the Office of General Counsel of the United States Department of Defense ("DOD"). Unless otherwise indicated, the statements in this declaration are based upon my personal knowledge and information obtained by me in the course of my official duties.

2. I make this declaration in support of DOD's Reply Memorandum of Law in Further Support of its Motion for Summary Judgment and in Opposition to Plaintiff's Cross-Motion for Summary Judgment.

The International Committee of the Red Cross

3. On March 3, 2006, DOD produced approximately 4,750 pages of documents to Plaintiff, constituting the following:

a. Approximately 3,900 pages of Combatant Status Review Tribunal ("CSRT") transcripts and related documents with only the names of U.S. Government personnel redacted. This production included unredacted copies of messages transmitted between detainees and their family members through the International Committee of the Red Cross (hereinafter "ICRC"). (Bates 0041-43, 0288-0294, 0441-0445A, 0884-0887, 1748-1754, 1816-1818, 3267-3270, 3286-3296, 3356-3364, 3392-3396, 3415-3418, 3556-3558B).

b. Over 850 pages of Administrative Review Board ("ARB") transcripts and related documents with only the names of U.S. government personnel redacted. This production did not include any unredacted copies of "Red Cross Messages," as DOD is withholding those documents as noted in its previous filings.

4. On March 6, 2006, representatives of the ICRC learned for the first time that the DOD had publicly released "Red Cross Messages" (hereinafter "RCMs") as part of the CSRT FOIA release. This organization objected to the disclosure of these messages and subsequently submitted a formal written request that such RCMs not be disclosed in any future releases. This request is provided at Exhibit A. Pursuant to this request, the Deputy Secretary of Defense has determined that these RCMs should be withheld under Exemption 3 of the Freedom of Information Act pursuant to 10 U.S.C. § 130c. His determination is provided at Exhibit B. The DOD Directive referred to in his determination is attached hereto as Exhibit C.

5. The Armed Forces of the United States and DOD have a long-standing relationship with the ICRC because of its unique role in regard to prisoners of war and other detainees held during armed conflict. The 1949 Geneva Conventions expressly prescribe and recognize a role for the ICRC, i.e. Articles 9 and 126 of the Third Geneva Convention (Prisoners of War), and Articles 10 and 143 of the Fourth Geneva Convention (Civilians). These roles including accounting for persons protected by the Geneva Conventions through collection of information reported to the ICRC by detaining powers, visiting places where such persons are interned, imprisoned or held pending transfer, privately interviewing such persons, and advising and reporting to governments engaged in hostilities on the condition of prisoners of war and detainees held by the various nations involved. The ICRC's ability to have access to detainees and obtain information about them in a confidential setting is crucial to the performance of its role under the Geneva Conventions. In 2003 alone, ICRC representatives visited more than 460,000 detainees held by multiple countries in more than 1,900 places of detention. A copy of the summary of its role is provided at Exhibit D. No other entity has the role as recognized by the Geneva Conventions and the degree of access to detention operations of a government as that enjoyed by the ICRC.

6. Commencing in early 2002, the Department of Defense transferred enemy combatants captured abroad to a detention facility at Guantanamo Bay, Cuba. The ICRC requested the opportunity to visit detainees at Guantanamo. The United States has granted that request, and the ICRC has since made regular visits to Guantanamo.

7. The Geneva Conventions provide for the ICRC to fulfill the humanitarian role of facilitating communications between persons detained and their families. During its visits to Guantanamo, the ICRC delegation meets privately with detainees and provides them the opportunity to send

correspondence to family members through RCMs. The ICRC delegation also delivers correspondence from family members to the detainees. This correspondence is written on pre-printed forms that contain the ICRC name. Each form includes the ICRC's restriction that the contents of the correspondence must be limited to "family news of a strictly personal nature." A sample form is provided as Exhibit E.

8. The ICRC provides both types of mail (mail addressed to a detainee and mail being sent from a detainee) to the Department of Defense for a review to ensure that classified or other inappropriate information is not transmitted to or from the detainees. Following this review, the RCMs are returned to the ICRC, which then hand-delivers them to the addressees through ICRC delegations, national Red Cross and Red Crescent societies around the world. The neutrality of the ICRC allows these messages to be passed across borders and conflict frontlines.

Transfers and Release of Detainees

9. The fact that detainees have left Guantanamo has been a matter of public record since they began leaving in late 2002, long before the Administrative Review Board process began. As of February 2006, the DOD has transferred or released 267 detainees from Guantanamo. Immediately following each such movement of detainees, the DOD posts a press release on its website, announcing their departure. The first departure of detainees was on October 26, 2002, and a press release announcing that fact was posted on the DOD website on October 28, 2002. (A copy of that release is provided at Exhibit F and can be found at http://www.defenselink.mil/releases/2002/b10282002_bt550-02.html). Twenty-four additional press releases regarding detainee departures were posted between October 2002 and July 20, 2005. (A copy of the list of press releases is provided at Exhibit G and can be found at

http://www.defenselink.mil/news/detainees.html). The press release posted on July 20, 2005 was the first to announce the departure of detainees through the Administrative Review Board process. (A copy of that release is provided at Exhibit H and can be found at http://www.defenselink.mil/releases/2005/nr20050720-4122.html).

10. The first round of ARBs was conducted between December 2004 and January 2006. In total, 464 ARBs were held during that time frame. The DCO initially determined that 134 of these detainees could either be released or transferred from Guantanamo, subject to diplomatic and logistical details being completed. The DCO subsequently determined, as a result of inter-agency consultations, that one of these 134 detainees should continue to be detained. To date, 20 of the remaining 133 detainees have left Guantanamo as a result of the ARB process. (My prior declaration mistakenly indicated that 20 detainees had left and over 130 were still pending potential transfer).

Electronic Posting of FOIA Releases

11. The Electronic Freedom of Information Act Amendments of 1996 require each federal agency to make available for public inspection and copying "copies of all records … which have been released to any person [under a FOIA request] … and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records." 5 U.S.C. Section 552 (a)(2)(D), as amended by Public Law No. 104-321, 110 Stat. 3048, effective March 31, 1997. The agency is required to make such records available by computer telecommunications, i.e. through an electronic Reading Room. *Id.* DOD's FOIA regulation was subsequently updated to include these requirements. *See* DoD Freedom of Information Act Program, DOD 5400.7-R, available at

http://www.dtic.mil/whs/directives/corres/pdf/54007r_0998/p54007r.pdf. This regulation instructs that a determination of whether records fit within this category should be based on certain factors, including the DOD's previous experience with similar records, the identity and number of requesters and whether there is widespread press, historic or commercial interest in the records. *See id.* § C2.1.2.4.

12. The detainee-related records released to Plaintiff on March 3, 2006 were posted in the DOD's electronic Reading Room in the early morning hours of March 4, 2006. (See http://www.defenselink.mil/pubs/foi/detainees/csrt/index.html). This posting was made following DOD's determination that the records at issue met the requirements listed in paragraph 11 above, based on the substantial number of press inquiries in the period leading up to the release of the documents to Plaintiff. DOD believes that any subsequent FOIA releases to Plaintiff will also be posted electronically for the same reasons.

Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC)

13. Rear Admiral James McGarrah was appointed as the Director of OARDEC on July 11, 2004 and has served in that position continuously since that time. His name and title have been a matter of public record since he was appointed.

The Protective Order Covering Attorney Contacts with Detainees

14. Several hundred detainees currently have habeas corpus petitions pending in U.S. District Court for the District of Columbia. These detainees are represented by a number of civilian attorneys. The district court has imposed a litigation-wide protective order (attached hereto as Exhibit I), which governs, among other things, the scope of and limitations on these attorneys' contacts with their detainee-clients at Guantanamo. That protective order prohibits the habeas

attorneys from serving as conduits for press interviews of their clients. (*See* ¶¶ IV.A.5, IV.B.4-5, V.A, VI.C and II.E). Accordingly, under this Protective Order, habeas counsel would not be permitted to "transmit" questions from the press to a detainee.

Documents Referred to in DOD's Reply Memorandum

15. Attached hereto as Exhibit A is a true and accurate copy of the March 10, 2006 letter from the International Committee of the Red Cross.

16. Attached hereto as Exhibit B is a true and accurate copy of the determination signed by the Deputy Secretary of Defense on March 13, 2006.

17. Attached hereto as Exhibit C is a true and accurate copy of DOD Directive 5105.02.

18. Attached hereto as Exhibit D is a true and accurate copy of a portion of the website of the International Committee of the Red Cross.

19. Attached hereto as Exhibit E is a true and accurate copy of a blank Red Cross message form.

20. Attached hereto as Exhibit F is a true and accurate copy of the press release posted on the DOD website on October 29, 2002.

21. Attached hereto as Exhibit G is a true and accurate copy of the listing of press releases posted on the DOD website between October 2002 and March 2006.

22. Attached hereto as Exhibit H is a true and accurate copy of the press release posted on the DOD website on July 20, 2005.

23. Attached hereto as Exhibit I is a true and accurate copy of the Amended Protective Order entered in the habeas litigation pending in the U.S. District Court for the District of Columbia.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 13, 2006.

Karen L. Hecker

Karen L. Hecker